92-293

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

No. 92-

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a BARKLEE REALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. PETER SHERWOOD
Corporation Counsel,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 788-1010, 1035 or 1073

LEONARD J. KOERNER,*
BARRY P. SCHWARTZ,
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

August 11, 1992

*Counsel of Record

17pp

QUESTIONS PRESENTED

1. When a plaintiff claims a denial of procedural due process not because the process allegedly was inadequate, but rather simply because the agency allegedly took too long to act on his or her application, is predeprivation process impossible so that, under *Parratt v. Taylor*, 451 US 527 (1981), and *Zinermon v. Burch*, 494 US 113 (1990), the State meets the requirements of procedural due process by making available the remedies of mandamus to compel the agency to act and money damages for any unconstitutional delay?

2. If *Parratt* and *Zinermon* do not apply to such a claim, did respondent state a claim upon which relief may be granted, for denial of procedural due process because of administrative delay, where she merely alleged a chronology of events and then simply asserted that the delay is "unreasonably long" and the forms she must file are "unnecessarily complex"?

TABLE OF CONTENTS

Questions Presented	.....	i
Opinion Below	.....	1
Jurisdiction	.....	2
Relevant Statutes and Regulations	.....	2
Statement of the Case	.....	2
District Court Jurisdiction	.....	7
Reasons to Grant Writ	.....	7
Conclusion	.....	14

TABLE OF AUTHORITIES

Cases:

Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F2d 112 (2d Cir, 1984) 12

Barry v. Barchi, 443 US 55 (1979) 9

Bonnano v. Town Board, 148 AD2d 532, 538 NY Supp 2d 864 (2d Dept, 1989) 11

Campo v. New York City Employees' Retirement System, 843 F2d 96 (2d Cir), *cert. denied*, 488 US 889 (1988) 11

Colton v. Riccobono, 67 NY2d 571, 505 NY Supp 2d 581 (1986) 11

Eastway Construction Corp. v. City of New York, 762 F2d 243 (2d Cir, 1985), *cert. denied*, 484 US 918 (1987) 11

Giglio v. Dunn, 732 F2d 1133 (2d Cir), *cert. denied*, 469 US 932 (1984) 11

Gross v. Perales, 72 NY2d 231, 532 NY Supp 2d 68 (1988) 11

Hudson v. Palmer, 468 US 517 (1984) 9

Isaacs v. Bowen, 865 F2d 468 (2d Cir, 1989) 6

Katz v. Klehammer, 902 F2d 204 (2d Cir, 1990) 11, 11

Logan v. Zimmerman Brush Co., 455 US 422 (1982) 5, 9

Loudermill v. Cleveland Board of Education, 470 US 532 (1985) 9, 12, 13

Mathews v. Eldridge, 424 US 319 (1976) 6

Parratt v. Taylor, 451 US 527 (1981) ..... i, 1, 5, 8, 9, 11, 12

Parsa v. State, 64 NY2d 143, 485 NY Supp 2d 27 (1984) 12

Zinermon v. Burch, 494 US 113 (1990) ..... i, 7, 9, 10 & n.1

Statutes:

28 USC § 1254(1) 2

28 USC § 1331 7

28 USC § 1343 7

Fed. R. Civ. P. 12(b)(1) & (6) 5

NY Real Property Tax Law § 467-b 3

NY City Administrative Code §§ 26-405[m], 26-406 & 26-509 3

Rules of the Supreme Court of the United States:

10.1(c) 2

13.1 2

13.4 2

No. 92-

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a BARKLEE REALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals held that respondent's procedural due process claim, that petitioners simply took too long to act on her application, was not barred by *Parratt v. Taylor*, 451 US 527 (1981), because respondent challenges an established state procedure and not a random and unauthorized departure from an established procedure. The Court of Appeals also held whether the delay here was so great as to violate respondent's due process rights could not be determined from the amended complaint and that petitioners' motion to dismiss the due process claim for failure to state a claim upon which relief may be granted therefore should be denied.

The decision of the Court of Appeals is reported at 959 F2d 395 (2d Cir, 1992). The decision of the District Court is not reported.

JURISDICTION

The District Court dismissed the amended complaint by judgment entered May 29, 1991 (App. 46-47). The Court of Appeals issued its judgment on March 19, 1992 (App. 28-29). Petitioners filed a motion for rehearing on April 3, 1992, one day late, and were granted leave to file that motion one day late by order dated April 14, 1992 (App. 50). The petition for rehearing was denied on May 18, 1992 (48-49), and this petition is timely filed, Rules of the Supreme Court of the United States, Rules 13.1, 13.4. This Court has jurisdiction under 28 USC § 1254(1) and Rule 10.1(c) of the Rules of this Court.

RELEVANT STATUTES AND REGULATIONS

New York Real Property Tax Law § 467-b (App. 104-14); New York City Administrative Code §§ 26-405[m], 26-406 & 26-509 (App. 77-103).

STATEMENT OF THE CASE

Respondent owns and manages a 16-unit apartment building in Manhattan (App. 53). As relevant here, the amended complaint challenges New York City's Senior Citizen Rent Increase Exemption ("SCRIE") program. Under this program, eligible senior citizens may receive exemptions from rent increases. These exemptions are equal to the amount by which the rent otherwise to be paid

by the senior citizen in question would exceed one-third of his or h ncome.

When a senior citizen is awarded a SCRIE exemption, the landlord receives a certificate showing the amount of the exemption. The landlord then submits the certificate and other documentation to petitioners and the landlord, in tur receives a real estate tax credit equal to the exemption. t the landlord's option, the landlord may receive cash or apply the credit to real estate taxes. The landlord ceives cash if the credit is greater than the landlord's real estate taxes, in which case the cash payment generally is referred to as 'excess SCRIE." NY Real Property Tax Law § 467-b; NYC Admin. Code §§ 26-405[m], 26-406 & 26-509 (App. 77-114).

Only excess SCRIE is relevant here. The amended complaint alleges as follows. Respondent had four SCRIE tenants in 1988 (App. 54). Her application for excess SCRIE for that year was returned because she had not su tted all required documentation (App. 54). After o ng e necessary documents from petitioner New Y City Department of Housing Preservation and Development ("HPD"), respondent reapplied in May 1989 for her 1988 excess SCRIE (App. 54). As of July 6, 1990, the date of the amended complaint, respondent had not received a response to her application for excess SCRIE for 1988 (App. 55, 75).

The amended complaint also alleges that respondent had four SCRIE tenants in 1989 and that she applied for excess SCRIE for that year in May of 1990 (App. 55). As of July 6, 1990, the date of the amended complaint,

respondent had not received a response to her application for excess SCRIE for 1989 (App. 56, 75). Respondent had four SCRIE tenants in 1990 but as of July 6, 1990, the date of the amended complaint, she had "been able to collect only $705.50 of the $2,331.36 owing under the SCRIE Program for the Property" for the period January through June, 1990 (App. 57). This allegedly was so because HPD had not issued to her some of the documents necessary for her SCRIE application and because respondent "will rely entirely on Excess SCRIE payments for all rents under the SCRIE Program" (and could not apply for excess SCRIE until that period had ended) (App. 57).

The amended complaint also charges that the forms that respondent must file under the SCRIE program are "unnecessarily complex and require [her] to spend excessive amounts of time collecting the rent for SCRIE Tenants and paying the real estate taxes on the Property" (App. 58). Specifically, respondent asserts, the form that must be filed with each quarterly real estate tax payment requires her "to assemble detailed information and to complete, notarize and mail forms as well as to pay the tax balance by check" (App. 58). Respondent also asserts that the form that must be filed annually for excess SCRIE requires that she "assemble detailed information, attach voluminous supporting documentation, complete, notarize and mail the application, and be subject to audit by [petitioners] with respect thereto" (App. 58). The supporting documentation for respondent's 1988 and 1989 excess SCRIE applications was 35 and 30 pages, respectively (App. 59). Respondent also charges that petitioners already have in their files virtually all the information and supporting documentation required (App. 59).

Respondent further alleges, upon information and belief, that petitioners "have assigned inadequate staff to process SCRIE documentation and applications for Excess SCRIE and have failed to allocate sufficient funds from the City budget to pay all claims for Excess SCRIE as they are received" (App. 60).

The District Court dismissed the amended complaint in its entirety under Fed. R. Civ. P. 12(b)(1) & (6), holding in relevant part that respondent's due process challenge to the SCRIE program was barred by the doctrine of *Parratt v. Taylor*, 451 US 527 (1981), because, even assuming that respondent had pled a denial of a protected property interest, "the [State court] review of administrative actions under New York CPLR Article 78 satisfied his [sic] right to due process" (App. 40-42). For that proposition the District Court cited three cases in which the Second Circuit Court of Appeals had both found *Parratt* applicable and held that an Article 78 proceeding was an adequate postdeprivation remedy under *Parratt* (App. 41 n.12).

The Court of Appeals reinstated respondent's claim that her federal due process rights allegedly were violated by the delay in issuing her excess SCRIE (App. 20-27). The Court of Appeals held that respondent's claim did not come within the *Parratt* rule because respondent does not challenge a random, unauthorized act but rather "established state procedures that cause the delays and burdens which deprive her of her property," citing *Logan v. Zimmerman Brush Co.*, 455 US 422, 436 (1982) (App. 20-21).

On the merits, the Court of Appeals stated (App. 24):

> While we recognize that "[r]egrettably, delay is a natural concomitant of our administrative bureaucracy," *Isaacs [v. Bowen]*, 865 F2d [468] at 477 [(2d Cir. 1989)], we are not prepared to conclude, without further evidence, that the delays here are reasonable. Although no bright-line rule exists for determining when a delay is so burdensome as to become unconstitutional, we think that there is a least a question of fact as to whether these delays were egregious and without any rational justification. Given the case-by-case approach required in due process cases, *see [Mathews v.] Eldridge*, 424 US [319] at 344 [(1976)], the issue must be determined on a full evaluation of all the circumstances.

The Court of Appeals directed the District Court, on remand, to determine whether the burdens and delays imposed by petitioners were reasonable (App. 25-27). The Court of Appeals directed the District Court to bear in mind "the deference appropriately accorded by courts to executive agencies regarding practicalities encountered by those agencies in administering legislative programs" and to consider the following factors (App. 26-27) (citation omitted):

> [T]he procedures actually used by [petitioners] to determine whether a landlord is entitled to the claimed excess SCRIE payments, the facts

> [petitioners] consider[], the level of difficulty in making the determination, the amount of work required, the amount of decision-making discretion given to the employees, the need for and availability of administrative appellate review, the necessity for the paperwork and supporting documentation required, the amount of time required to process similar claims, and any other factors that may bear on whether "due process" is provided.

Petitioners petitioned for rehearing, arguing that under *Zinermon v. Burch*, 494 US 113 (1990), the Court of Appeals should have focused on the question of whether predeprivation process was possible and not on whether the allegedly unconstitutional delay was the result of an established state procedure. Petitioners argued that predeprivation process was not possible here because there is no way of knowing when the delay on each of the thousands of applications pending with City agencies at any time is about to pass from the constitutional to the unconstitutional. The Court of Appeals denied the petition without opinion (App. 48-49).

DISTRICT COURT JURISDICTION

The District Court has jurisdiction under 28 USC §§ 1331 and 1343 (*see* App. 52 [amended complaint]).

REASONS TO GRANT WRIT

The Court of Appeals' ruling here will open the floodgates and drown the District Courts with section 1983

cases brought by every person who believes that a federal, state, county, city, town or village agency, or public authority, has taken too long to process an application. Although some of these plaintiffs may come to Court too early, and their complaints may be dismissed for failure to state a claim upon which relief may be granted, many of these cases may require exactly what the Court of Appeals has directed the District Court to do here: supervise discovery and then sit in judgment on numerous agency practices in order to determine whether the delay attributable to those practices is reasonable. Under the Court of Appeals' analysis, the fact that State law provides for a judicial remedy in the form of mandamus directing the agency to act, and even money damages for any unconstitutional delay, would be entirely irrelevant.

Unfortunately, it is reasonable to expect that a consequence of recent government cutbacks on the federal, state and local level will be an increase in the length of time agencies require to process applications and render determinations. This being so, the number of cases in which plaintiffs claim that their due process rights were violated by delay alone certainly will increase, and probably substantially. In addition to the Court of Appeals' holding on *Parratt*, the lure of attorneys' fees under section 1988 of title 42 will be a further guarantee that these suits will be heard in federal Court.

(1)

This Court has recognized that at some point a delay in governmental action can become so great as to violate

procedural due process. *Loudermill v. Cleveland Board of Education*, 470 US 532, 547 (1985); *Barry v. Barchi*, 443 US 55, 66 (1979). In neither of these cases, however, did the government raise the *Parratt* issue.

Parratt v. Taylor, *supra*, 451 US 527, and the succeeding cases *Logan v. Zimmerman Brush Co.*, 455 US 422 (1982), and *Hudson v. Palmer*, 468 US 517 (1984), established that there is no denial of procedural due process when the deprivation is the result not of established state procedures, but rather of a random and unauthorized departure from those procedures, and State law provid n adequate post.eprivation r y. In *Zinermon v. Bu h*, 494 US 113 (1990), the pl ff alleged that there was a flaw in Florida's established state rocedures for the admission of me tal patients becaus although patients could be dmitted as voluntary patients only if they gave informe consent to admission, Florida law had no procedure design to ensure that those v sought admission volu ry patients were competen o consent to admissi ... Elaborating on the meaning of the phrase "random and unauthorized departure," this Court held that the plaintiff had stated a claim for denial of procedural due process because: (1) the risk of an err eous deprivation, in that case the risk that a person would sign the forms for voluntary admission although he or she was not competent to consent to admission, was predictable; (2) the persons who effected the deprivation were authorized to effect the depri ion ., to admit pat nts; and (3) predeprivation proc , f xample a hearing on competence, was possible. US at 136-38.

For purposes of the present case,[1] *Zinermon* clarifies the difference between "established state procedures" and a "random and unauthorized departure" from those procedures. The persons charged with acting on respondent's excess SCRIE application are not authorized to effect the deprivation that took place, *i.e.*, a delay so long that a denial of procedural due process occurs. The deprivation is not predictable, as petitioners have no way of knowing when the length of time that each of the pending applications has been pending is about to become so great that the applicant is about to be denied procedural due process. And predeprivation process is not possible, in that it is not realistic to require the State periodically to hold a hearing on the question of whether the length of time each application has been pending is about to become so great as

---

[1] *Zinermon* was a 5-4 decision. The dissent argued that the plaintiff had pled a random and unauthorized departure from the statutory requirements, 494 US at 140-41 (O'Connor, J. dissenting), and that, in any event, there was no flaw in Florida's statutory procedures because the statute plainly provided that if a person could not give informed consent that person must be treated as an involuntary patient, *id.* at 140 (O'Connor, J., dissenting). The dissent also disagreed with the majority's analysis that Florida had delegated to the admissions personnel the responsibility to see that patients received procedural due process in the admission process and that, as a result, Florida should be liable for their failure to do so in any given case. *Id.* at 145-50 (O'Connor, J., dissenting). That conclusion of the majority, however, is not relevant to the present case. For present purposes, the dissent was in essential agreement with the majority that *Parratt* will apply when the State cannot predict in advance when the deprivation will occur, and thus cannot provide predeprivation process, and those who effect the deprivation are not authorized to effect the deprivation at issue. 494 US at 141-44, 146 (O'Connor, J., dissenting).

to deny the applicant due process.

On the subject of whether New York law provides an adequate postdeprivation remedy for the deprivation respondent alleges here, at present let it suffice to say that the Second Circuit Court of Appeals has held in numerous cases, in which it has applied *Parratt*, that an "Article 78" proceeding in the New York Courts is an adequate postdeprivation remedy. *E.g.*, *Katz v. Klehammer*, 902 F2d 204, 206-07 (2d Cir, 1990); *Campo v. New York City Employees' Retirement System*, 843 F2d 96, 100-03 (2d Cir), *cert. denied*, 488 US 889 (1988); *Eastway Construction Corp. v. City of New York*, 762 F2d 243, 250 (2d Cir, 1985), *cert. denied*, 484 US 918 (1987); *Giglio v. Dunn*, 732 F2d 1133, 1135 (2d Cir), *cert. denied*, 469 US 932 (1984). In an Article 78 proceeding respondent could obtain a judgment in the nature of mandamus directing petitioners to act on her application and awarding her damages under the due process clause for any unconstitutional delay. NY CPLR § 7803[1] (mandamus available in Article 78 proceeding); *Katz v. Klehammer*, *supra*, 902 F2d at 207 (same); *Gross v. Perales*, 72 NY2d 231, 235, 532 NY Supp 2d 68, 70 (1988) (damages may be recovered in Article 78 proceeding where incidental to primary relief of mandamus); *Colton v. Riccobono*, 67 NY2d 571, 575-76, 505 NY Supp 2d 581, 583-84 (1986) (proper to raise in Article 78 proceeding plaintiff's claim that statute and court rule violated procedural due process by delaying trial of her action); *Bonnano v. Town Board*, 148 AD2d 532, 532-33, 538 NY Supp 2d 864, 864-65 (2d Dept, 1989) ordering town to act on application for plumber's license where delay had become unreasonable).

Respondent also could obtain her excess SCRIE benefits in a plenary action for money had and received. *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F2d 112, 125 (2d Cir, 1984); *Parsa v. State*, 64 NY2d 143, 485 NY Supp 2d 27 (1984).

(2)

This petition should be granted even if this Court agrees with the Court of Appeals that *Parratt* does not apply here. The floodgates also will be opened by the Court of Appeals' holding that the delay here might prove, upon examination of all the facts and circumstances, to be so lengthy as to violate due process, when all that respondent has set forth in the amended complaint is a chronology of events and the conclusion that the delay was too long. The Court of Appeals' holding also is in direct conflict with a decision of this Court.

Respondent's amended complaint simply relates the events in chronological order and alleges that petitioners' failure to act on her excess SCRIE application by the date of the amended complaint violated her rights to procedural due process. This Court held that a similar complaint, involving a nine-month delay, failed to state a claim upon which relief may be granted because that complaint "reveal[ed] nothing about the delay except that it stemmed in part from the thoroughness of the procedures" and included "no indication that [the plaintiff's] wait was unreasonably prolonged other than the fact that it took nine months." *Loudermill v. Cleveland Board of Education, supra*, 470 US at 547. This Court stated, "The chronology

of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation." *Id.* (footnote omitted).

As set forth above, the delay here was from May of 1989, when respondent submitted her application, to July of 1990, the date of the amended complaint (App. 55, 75). But applications for excess SCRIE contain a great deal of numbers and petitioners must verify the numbers and other information on the applications. The purpose of this verification is to discover mistakes and fraud that would lead to improperly inflated payments to landlords. Prevention of such mistakes and fraud obviously is a governmental interest of the highest order. We respectfully submit that the Court of Appeals' ruling that the fourteen-month delay here may violate the due process clause not only is erroneous in light of *Loudermill* but also will encourage every person who has been awaiting

governmental action for fourteen months or more to run to federal court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

O. PETER SHERWOOD
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD KOERNER,*
BARRY P. SCHWARTZ,
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

* Counsel of Record.